

# **EXHIBIT 1**

Organogenesis - 3-6-07 Hearing TX (PWC Motion to Compel)

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736JPRIM Motions  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
-----X

IN RE: SUBPOENA ISSUED TO M8-85  
PRICE WATERHOUSE COOPERS, LLP  
-----X

March 6, 2007  
11:15 a.m.

Before:

HON. MIRIAM GOLDMAN CEDARBAUM,  
District Judge

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(In open court)  
(Case called)  
THE COURT: You were in the courtroom this morning perhaps when you heard me inquire why this is not appropriately determined by the court knows about this case.

MR. FRANK: Well, William Frank for Skadden Arps. May I first make a motion in support of my partner Matthew Matule from our Boston office pro hac vice.

THE COURT: I normally get those in advance, but I will hear him anyway.

MR. FRANK: Thank you. I will hand this up to the court.

THE COURT: I take it you are here because this matter is in Massachusetts, MR. Matule?

MR. MATULE: Yes, your Honor, this matter is.

THE COURT: So is there any reason, since rightly your firm brought you in because you know about it and clearly the judge in Massachusetts knows about it, is there any reason why I should not defer to the judge in Massachusetts?

MR. MATULE: Two points, your Honor. Price Waterhouse Coopers is here as the respondent to the motion to compel.

THE COURT: Then I should turn first to the moving party.

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 MR. SLOANE: Good afternoon.  
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1 THE COURT: That is what I thought I was doing.  
 2 MR. SLOANE: Perhaps we should have been sitting in  
 3 different places.  
 4 THE COURT: It is usually the other way. It doesn't  
 5 matter.  
 6 MR. SLOANE: My name is Peter Sloane. I represent the  
 7 petitioners on the motion.  
 8 THE COURT: I ask you that question, Mr. Sloane, why  
 9 should I not differ to the judge who really knows what is  
 10 happening in this case?  
 11 MR. SLOANE: Because under Rule 37 --  
 12 THE COURT: That is different. You are talking about  
 13 why you had to bring it in this district, not why it has to  
 14 stay here.  
 15 MR. SLOANE: Well, because I believe under the rule,  
 16 the court, this Court, is the one that has jurisdiction to  
 17 enforce the subpoena. It is issued from this court.  
 18 THE COURT: That is correct, but I also have the  
 19 power, as I read the law, to transfer this matter to the judge  
 20 who really knows about the case and is in a much better  
 21 position to determine whether this subpoena should be enforced.  
 22 I am asking you, can you give me any good reason for  
 23 not doing that?  
 24 MR. SLOANE: Well, there are several.  
 25 THE COURT: All you're telling me is why you brought  
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1 it here in the first instance. I understand why.  
 2 MR. SLOANE: Well, there are two reasons.  
 3 THE COURT: Yes.  
 4 MR. SLOANE: First, I am not sure, your Honor, the  
 5 court in Massachusetts would have --  
 6 THE COURT: I know it would.  
 7 MR. SLOANE: -- have jurisdiction to enforce this  
 8 subpoena.  
 9 THE COURT: Yes. If I defer decision to the court in  
 10 Massachusetts on the issue of whether the subpoena should be  
 11 enforced, if you're telling me that if the judge in  
 12 Massachusetts wants me to ultimately enforce its decision, that  
 13 is fine, I have no problem with that. I am not even sure  
 14 that's correct, but I have no doubt that I can seek a  
 15 determination by the judge who is most knowledgeable here.  
 16 MR. SLOANE: Well, I won't respond to that, your  
 17 Honor, but the second reason is that the issue here is not  
 18 really one that depends on for the most part the facts of the  
 19 case because the issue here is the cost of compliance with the  
 20 subpoena. That is not one that I believe is necessary for  
 21 Judge Tauro to make is the judge presiding in --  
 22 THE COURT: It is my experience, as a judge who  
 23 presides over many cases, that determining what is a reasonable  
 24 arrangement here is very much informed by other things that  
 25 have gone on in the case that I know nothing about.  
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1 MR. SLOANE: Apart from the reasons that I've given --

2 THE COURT: That is, what your client is doing is  
3 conditioning his compliance on some agreement. I am not here  
4 to enforce a condition that a party sets.

5 MR. SLOANE: Your Honor, I don't believe that there  
6 was no agreement between the parties about the costs of  
7 compliance of the subpoena.

8 THE COURT: As I understand it, somebody has refused  
9 to do this unless something happens. Is that wrong?

10 MR. SLOANE: What happened is we issued a subpoena to  
11 Price Waterhouse because they were the auditors involved in the  
12 case and they said we are not going to provide any documents to  
13 you unless you pay us \$120,000. We never agreed to do that.

14 THE COURT: Of course, of course.

15 MR. SLOANE: So there was no agreement between the  
16 parties.

17 THE COURT: I understand. Whether that is a  
18 reasonable request I think is much better determined by the  
19 judge in Massachusetts who is in a position to know who has  
20 done what here and what is reasonable in connection with  
21 discovery in this case. These are not isolated matters. This  
22 is part of a whole lawsuit. Isn't that right?

23 MR. SLOANE: Correct.

24 THE COURT: Normally, judges in lawsuits determine  
25 discovery disputes. That is what this is essentially, a

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1 discovery dispute. Isn't that right?

2 MR. SLOANE: It is, your Honor, but again since it  
3 relates to a subpoena that was issued from this court, we  
4 believe that this court has not only jurisdiction, but also the  
5 power to determine the issue.

6 THE COURT: Of course I have the power.

7 I am asking you how to exercise it most sensibly and I  
8 think the most sensible way for me to exercise this power is to  
9 defer to the court in Massachusetts that understands the  
10 significance of these documents, whether they really are  
11 necessary, what they are in the case and how burdensome it is  
12 under all the circumstances to produce them.

13 Isn't that right?

14 MR. SLOANE: Well, first I point out that there isn't  
15 any question, at least with respect to the documents that Price  
16 Waterhouse says it intends to produce, that those documents are  
17 relevant. That is not an issue that I understand to be in  
18 dispute. If the question is one that goes to judicial --

19 THE COURT: Do I understand that both sides agree that  
20 these documents are relevant?

21 MR. MATULE: The documents that PWC has indicated in  
22 its responses and objections to the subpoena it was going to  
23 produce, which is the work papers for the 1999, 2000 and 2001  
24 fiscal years, PWC does not object to the relevance of those  
25 documents.

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1 PWC was a recipient of Rule 45 subpoena for documents  
2 only. We filed a 45 (C)(2)(B), which is exactly what we were  
3 supposed to do back in July of 2006. We never heard back on  
4 those objections until the end of 2006, beginning of 2007.

5 I would defer to your Honor your Honor. I am more

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 7 than happy to have you decide the issue. I am equally certain  
 8 that Judge Tauro would, in the District of Massachusetts, would  
 9 decide the issues as --  
 10 THE COURT: As objections to the production of these  
 11 documents either on the ground it is too burdensome or it isn't  
 12 too burdensome or whatever is being asserted. I decide those  
 13 issues every day of the week in cases before me where I know  
 14 what is involved.  
 15 MR. MATULE: I would submit that burden and  
 16 burdensomeness has many components, and one of them is what is  
 17 built into Rule 45, which is the protection from significant  
 18 expense. I would put the expense as part of the burden in  
 19 responding to the subpoena, not just the manhours.  
 20 THE COURT: That may be, but I think that Judge Tauro  
 21 is in a much better position to gauge whether the expense is  
 22 proportional or disproportional.  
 23 MR. MATULE: That is not disputed from our position.  
 24 THE COURT: Isn't that the issue --  
 25 MR. SLOANE: AS I --  
 THE COURT: -- whether the expense is disproportional  
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 1 or not?  
 2 MR. SLOANE: Well, that is one of the questions, yes.  
 3 I believe we have shown that they're not entitled to  
 4 the reimbursement of their costs, but to the extent that they  
 5 are entitled to that, the question then is what is the correct  
 6 amount.  
 7 As I understood your Honor's question before as one,  
 8 it was one that went to a question of judicial administration,  
 9 it would be inefficient at this point to transfer, in effect,  
 10 transfer this motion the District of Massachusetts.  
 11 THE COURT: Everything involved in this case is before  
 12 Judge Tauro. Isn't that right? Why is it inefficient?  
 13 MR. SLOANE: This motion has already been briefed and  
 14 now heard by this Court, and we would now have to --  
 15 THE COURT: I am going to send the papers to Judge  
 16 Tauro if I transfer it.  
 17 MR. SLOANE: There is also a question of time, your  
 18 Honor. We have a discovery cutoff at the end of April.  
 19 THE COURT: He is the one who is certainly in charge  
 20 of that. Isn't that right? I can't move his discovery  
 21 schedule.  
 22 MR. SLOANE: Even if the papers are transferred, Price  
 23 Waterhouse could make the argument that there is a lack of  
 24 jurisdiction by that court, and that is just more briefing.  
 25 THE COURT: Not if I have determined that issue. It  
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 1 is res judicata. This is not being sent to Massachusetts as an  
 2 appeal. This is my determination of this motion, that it  
 3 should be heard by the judge who is presiding over this case,  
 4 and I defer to his decision.  
 5 Now, if you want to say that what you'd like to do is  
 6 have me ultimately enforce it, that is fine, but in the first  
 7 instance, I think he should make the decision. I defer to his  
 8 view in a case that he has been presiding over, and I will send  
 9 all of the papers to him, and I will expect you to go before  
 10 him.

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 11 MR. SLOANE: May I raise one procedural issue that I  
 12 do believe the court has not just the power to decide but also  
 13 should decide?  
 14 THE COURT: Yes.  
 15 MR. SLOANE: That is the question of the timeliness of  
 16 Price Waterhouse Coopers' opposition to this motion.  
 17 THE COURT: That is a different matter. That is a  
 18 different matter. Tell me, when was the motion made?  
 19 MR. SLOANE: We served the motion on February 16th.  
 20 we invoked Rule 37. Under local rules, motions that are filed  
 21 under that rule require that the response be made in four  
 22 business days. That date was February 26th.  
 23 THE COURT: Just a moment. You're talking about our  
 24 local rules here in the Southern District?  
 25 MR. SLOANE: Correct. .  
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1 (Pause)  
 2 MR. SLOANE: Shall I continue?  
 3 THE COURT: Just a moment, unless you want to give me  
 4 a copy of the rules.  
 5 MR. SLOANE: Sorry. If I had one, I would give it to  
 6 your Honor.  
 7 THE COURT: Sorry. I never speak of a statute or a  
 8 rule that I don't have in front of me.  
 9 MR. SLOANE: Pardon me, your Honor.  
 10 (Pause)  
 11 MR. SLOANE: May I take this time to point out we did  
 12 submit a reply yesterday.  
 13 THE COURT: When yesterday?  
 14 MR. SLOANE: Yesterday afternoon we filed it and sent  
 15 a courtesy copy to your Honor. This issue was raised in the  
 16 reply.  
 17 THE COURT: Because of the tight security of  
 18 courthouses these days, nothing gets to me immediately. I am  
 19 flattered that you think I am such a speed-reader that if  
 20 something came last night, I would have already have digested  
 21 it.  
 22 MR. SLOANE: I did not think that, your Honor.  
 23 That is one of the points we make on this point  
 24 regarding timeliness, is that the opposition should have been  
 25 served earlier precisely for this reason, so the court would  
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1 have had the chance to review our reply that we spent the  
 2 weekend working on so it can be into the court on Monday.  
 3 THE COURT: I agree with you I should have gotten  
 4 opposition sooner.  
 5 (Pause)  
 6 THE COURT: I am not so familiar with this rule  
 7 because we also have the local rule on discovery motions, we  
 8 have conferences and never have motions.  
 9 MR. SLOANE: The local Rule 6.1 (a) provides that the  
 10 response is to be served within four business days. That would  
 11 have brought their response to February --  
 12 THE COURT: I see that.  
 13 MR. SLOANE: -- to February 26th. They submitted  
 14 their opposition on Friday, March 2nd.  
 15 THE COURT: All right. Do you want me to put this  
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 17 over for a week so you have more time?  
 18 MR. SLOANE: Well, we have submitted our reply, but we  
 19 believe the opposition should be stricken for untimeliness.  
 20 THE COURT: Well, you know, we do not generally like  
 21 forfeitures. We try to ameliorate in other ways.  
 22 If somebody doesn't have the time for something, if  
 23 one side doesn't have a sufficient amount of time because of  
 24 something the other side does, we give them more time. We  
 25 don't strike everything.  
 You see, this local rule is so rarely applicable  
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 1 because our local rules require that before any motion can be  
 2 made on a discovery issue, the party, the complaining party has  
 3 to seek a conference with the court, and I have never had any  
 4 motion after a conference. We normally resolve these matters  
 5 at conferences.  
 6 MR. SLOANE: If there had been a procedure for having  
 7 a conference for this, your Honor, I would have tried to  
 8 Schedule one.  
 9 THE COURT: I understand. I understand. If what you  
 10 want is more time to do a better reply, I will be happy to give  
 11 you more time.  
 12 MR. SLOANE: As I understand it, your Honor, your  
 13 Honor is not going to address the substance of the motion so I  
 14 don't think that that will serve any purpose.  
 15 THE COURT: Well, if there is some reason that you can  
 16 give me for not having you submit this to Judge Tauro, I will  
 17 consider it, but you've already given me all of the reasons you  
 18 can think of, as I think.  
 19 MR. SLOANE: I have, your Honor. I did not believe  
 20 that this would be an issue because I did believe that the  
 21 court, the court's jurisdiction here is clear, but I  
 22 understand --  
 23 THE COURT: Of course I have jurisdiction. We do not  
 24 always exercise all of our jurisdiction to the fullest if the  
 25 administration of justice points to a different way of  
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 1 proceeding. You know, we do have provisions in the rules for  
 2 transfer of cases and certainly we have the power to transfer  
 3 motions in circumstances like these.  
 4 MR. MATULE: I guess there are two things that I would  
 5 like to state, and I can interrupt here, I don't know if you're  
 6 done or not.  
 7 Lest the record be unclear, there is a disagreement,  
 8 obviously, about the timing in terms of response for this  
 9 motion, and I can address it or not, but it comes down to --  
 10 THE COURT: You probably should put it on the record.  
 11 MR. MATULE: I will be happy to. I will get to that.  
 12 I don't know what mechanism your Honor would prefer if  
 13 it is going to be the decision to defer to Judge Tauro and to  
 14 send it up to the District of Massachusetts, but we certainly  
 15 could help facilitate getting the papers up to Judge Tauro.  
 16 THE COURT: Of course. I would expect you're not  
 17 going to wait for the clerk to send them. You are going to  
 18 give Judge Tauro the papers.  
 19 MR. MATULE: As to the interplay between rules, Local  
 20 Rule 6.1 (a) and 6.1 (b), this is set out in the letters that  
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 22 were submitted to Judge McKenna when he was the Part One Judge  
 23 two weeks ago, and I don't know if they became part of the  
 24 package that came up to your Honor --  
 25 THE COURT: I don't think I have seen them, in any  
 event.

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1 MR. MATULE: -- or not. This is a Rule 45 subpoena,  
 2 and in particular it is Rule 45 (c)(2)(B) objections.  
 3 That rule has its own mechanism for moving to compel  
 4 over the objections. Local Rule 6.1 (a) only applies to Rules  
 5 26 through 37 and 45 (c)(3), which is a party seeking for a  
 6 protective order.

7 THE COURT: I see.

8 MR. MATULE: 6.1 (b) applies by its terms to all other  
 9 motions. It is the position of PWC, and it is in the letters,  
 10 two letters of February 26th letter and a March 1st letter to  
 11 Judge McKenna as well as Footnote 1 to respondent's brief which  
 12 lay out the rationale and the case law that make clear that  
 13 Rule 37 by its terms only applies to motions to compel against  
 14 a party in particular with respect to documents, Rule 34.

15 Rule 34 (c) says that if you want to compel on the  
 16 documents, you look to Rule 45.

17 THE COURT: Yes, that I am familiar with.

18 MR. MATULE: The cases are in re: Exxon Valdez out of  
 19 the D.C. District, District of Columbia, and Cruz versus  
 20 Meecham out of the District of Connecticut, two cases that are  
 21 in the letters to Judge McKenna.

22 The in re: Exxon Valdez case is a case that  
 23 petitioners rely on for other reasons, make it very clear that  
 24 Rule 37 only applies to parties and that the only provision  
 25 with respect to moving to compel documents from a non-party is

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1 pursuant to Rule 45. The provision of Rule 45 is not one of  
 2 the rules that is specified in Local Rule 6.1 (a), and so we  
 3 submit that rather than being untimely, the petitioners tried  
 4 to shorten the applicable time to PWC, the non-party in this  
 5 case, by invoking the inappropriate rule, which is clearly  
 6 contrary to the case law.

7 We followed the timing mechanism. I guess the bottom  
 8 line is we're timely. Petitioners did submit a reply. I  
 9 didn't hear them asking for more time to redo the reply. It is  
 10 a 15-page reply.

11 THE COURT: Replies are not normally of great  
 12 significance unless there is something raised for the first  
 13 time in response. Most replies are simply repetitions of the  
 14 original.

15 MR. MATULE: I only want to be clear we vigorously  
 16 dispute and think it is incorrect for the purposes of this  
 17 motion timing would be under Local Rule 6.1 (a).

18 THE COURT: Because you are proceeding under 45  
 19 (c)(3), is that what you said?

20 MR. MATULE: No.

21 THE COURT: That is the one referred to.

22 MR. MATULE: That is the one built into 6.1 (a).

23 We are the respondent here on a motion to compel. The  
 24 motion to compel would have to be pursuant to 45 (C)(2)(B)  
 25 because PWC timely objected and responded to the subpoena, and



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1 the only way for the party serving the subpoena to enforce that  
2 subpoena or get the objections overruled is to bring a motion  
3 to compel pursuant to the mechanism in Rule 45.

4 MR. SLOANE: May I respond, your Honor?

5 THE COURT: Just one moment. Let me read from Rule 45

6 (c)(2)(B).

7 "If objection has been made, the party serving the  
8 subpoena may, upon notice to the person commanded to produce,  
9 move at any time for an order to compel the production."

10 Now, you are moving to compel. Isn't that right?

11 MR. SLOANE: Correct, your Honor. We don't dispute  
12 that Rule 45 is also applicable here. Rule 37, by its terms,  
13 governs an application for an order compelling disclosure or  
14 discovery from a non-party. That is Rule 37 (a)(1).

15 THE COURT: You did not serve a subpoena?

16 MR. SLOANE: We did serve a subpoena, your Honor, on a  
17 non-party. We are moving to compel disclosure from that  
18 non-party. The procedure for doing so stems from Rule 37  
19 (a)(1).

20 MR. MATULE: Your Honor, I would submit if you look at  
21 Rule 37, specifically 37 Subpart (2) identifies motions and  
22 identifies the various motions that can be brought pursuant to  
23 Rule 37, and the only rule that is referenced is Rule 30, which  
24 would make sense if it was a subpoena for testimony brought in  
25 conjunction with both Rule 30 and Rule 45.

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1 what we have here is solely a subpoena for documents.  
2 The only mechanism under the federal rules for documents from a  
3 non-party is pursuant to Rule 45, and the procedure for  
4 compelling-over objections is set out in 45 (C)(2)(B).

5 THE COURT: Yes. Actually, 37 provides, with respect  
6 to being appropriate, an application for an order to a person  
7 who is not a party shall be made to the court in the district  
8 where the discovery is being taken. That is why you're here.  
9 That is in accordance with Rule 37 (a)(1).

10 MR. SLOANE: Correct, your Honor.

11 THE COURT: Well, in any event, we do not go into  
12 forfeiture.

13 MR. SLOANE: May I add --

14 THE COURT: Our local rules on discovery are so  
15 different from the expectation of motions.

16 MR. SLOANE: -- may I add one point with respect to  
17 the transfer?

18 THE COURT: Yes.

19 MR. SLOANE: This issue is subsumed, I think, under  
20 the issue of efficiency, but I think it bears pointing out  
21 some --

22 THE COURT: That is exactly what my concern is,  
23 efficiency.

24 MR. SLOANE: -- I think it bears noting specifically,  
25 though, that it is particularly inefficient to transfer the

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1 case where the issue is one of costs, and the costs that are at  
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 2 issue here are the costs claimed by Price Waterhouse include  
 3 all of their costs relating to anything having to do with the  
 4 subpoena. They're not just asking for --

5 THE COURT: That is exactly why the court in  
 6 Massachusetts is very able to assess whether they are  
 7 over-claiming.

8 MR. SLOANE: I understand, your Honor.

9 where I was going with that, we are simply now going  
 10 to have to have proceedings before the district judge in  
 11 Massachusetts, and no doubt Price Waterhouse Coopers is just  
 12 going to claim that that is an additional cost of thousands of  
 13 dollars that they want.

14 THE COURT: I have great confidence in the judge in  
 15 Massachusetts that he can evaluate that claim. I have great  
 16 confidence in my colleagues around the country to preside over  
 17 the cases that they are familiar with.

18 I receive cases from other districts and matters from  
 19 other districts in cases that I preside over because I am  
 20 familiar with the problems. I am sure that Judge Tauro is  
 21 familiar here, and what I think you should do is promptly  
 22 submit this issue to him. If there is any problem in his  
 23 issuing an order, I will be happy to facilitate his view, but I  
 24 think it should be referred to him.

25 MR. SLOANE: May I clarify what your Honor is saying?

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1 THE COURT: Yes. I am transferring this matter to  
 2 Judge Tauro, and if he needs my assistance for any reason under  
 3 the rules, I will be happy to provide that assistance, but in  
 4 the first instance he is the one best suited to decide the  
 5 matter.

6 MR. SLOANE: Do I understand that to mean that this  
 7 Court --

8 THE COURT: In any case that I preside over, I would  
 9 like to be the one to determine most of the things that come up  
 10 during the course of the case because it is his job to manage  
 11 the case. The presiding judge has to do that, and he,  
 12 therefore, should be most in control of what happens, and  
 13 because of his knowledge of the case, he is best suited to make  
 14 the most informed decisions.

15 MR. SLOANE: As I understand it, your Honor is  
 16 transferring this court's authority to decide the motion to  
 17 Judge Tauro?

18 THE COURT: I am deferring to Judge Tauro. You can  
 19 define that however you like or translate it however you like.

20 I think that he should make this decision. I will be  
 21 happy to abide by anything he does here. Very well. I will  
 22 endorse the papers accordingly. I will transfer the papers to  
 23 him, although I would hope that you can take the papers to him  
 24 promptly.

25 MR. SLOANE: Yes, your Honor. Can I ask that this

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1 Court provide that the issue be determined under Second Circuit  
 2 law since that is the law that was briefed, and otherwise we're  
 3 going to have to brief --

4 THE COURT: Is there any reason to believe that this  
 5 federal discovery issue is different in the First Circuit from  
 6 the Second Circuit?

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7 MR. SLOANE: Your Honor, I couldn't tell you that.  
8 THE COURT: These are all matters of discretion and  
9 judgment in both the Second Circuit and the First Circuit. We  
10 don't have black letter law on discovery disputes.  
11 MR. SLOANE: I am just trying to avoid, your Honor,  
12 having to have both sides prepare new briefs under --  
13 THE COURT: I am sure you do not have to provide new  
14 briefs.  
15 MR. SLOANE: That is why I was asking your Honor if  
16 the court would provide --  
17 THE COURT: This is not a question of law, of black  
18 letter law; this is a question which is answered based on all  
19 of the circumstances. It is a question of reasonable  
20 management of discovery in a case. I really think we've spent  
21 enough time on this.  
22 MR. SLOANE: I understand, your Honor. I was simply  
23 trying to reduce any costs to both parties here.  
24 THE COURT: I think you should certainly do that.  
25 (Court adjourned)

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